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IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1834~~ 154

IRA P. DOCTOR,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Ira P. Doctor, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims, Washington, D. C., made and entered in the above-entitled cause on February 23, 1966.

Opinion Below

The opinion of the United States Court of Claims (Appendix A, *infra,* A1) has not as yet been reported.

Jurisdiction

The order of the United States Court of Claims dismissing the petition herein was entered on February 23, 1966 (A1). Under the practice of the United States Court of Claims, there is no formal judgment additional to an

order dismissing a petition. The jurisdiction of this Court is invoked under Title 28, *United States Code*, Sec. 1255(1), providing for the granting of a writ of certiorari to review decisions of the United States Court of Claims.

Question Presented

Whether an agency of the United States may fraudulently conceal evidence of a violation of his constitutional rights from an accused at his federal criminal trial, to wit, an Army General Court-Martial, and then rely on the statute of limitations to bar the claim of such accused in the U. S. Court of Claims.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions which are relevant to the decision of this case are *U. S. Const.* amend. VI, and Title 28 U. S. C. Sec. 2501. The pertinent text of these constitutional and statutory provisions are set forth in Appendix B, *infra* (A2).

Statement of the Case

Petitioner, Ira P. Doctor, at the date of his court-martial, was a non-Regular Lieutenant Colonel in the United States Army. On June 2, 1954, he was convicted by an Army General Court-Martial in Kaiserslautern, Germany on three specifications of having given false answers during the course of an official investigation. Two of these specifications dealt with answers given during an investigation conducted by Lt. Col. Lex M. Stout. The third specification dealt with an answer given during an investigation conducted by Colonel James E. Bush. Both Col. Bush and Lt. Col. Stout were U. S. Army Inspector Gen-

erals. Petitioner was sentenced to dismissal from the service, total forfeitures and confinement at hard labor for three years.

The convening authority reduced the sentence to dismissal and total forfeitures. The sentence, as reduced, was affirmed by a U. S. Army Board of Review. The U. S. Court of Military Appeals affirmed the findings and the sentence on June 8, 1956, the Honorable Robert R. Quinn, Chief Judge, dissenting as to the findings of guilty as to two of the three specifications. The Department of Army substituted for the dismissal, a General Discharge under Honorable Conditions, effective December 17, 1956.

Captain Reid W. Kennedy, JAGC, was actively engaged in the accused's court-martial throughout the investigation, pretrial and trial stages, first as defense counsel and then formally at the trial as assistant defense counsel. Actually he functioned at the trial as co-counsel. Captain Kennedy testified as a witness at the investigation conducted by Colonel Bush. He also testified as a critical defense witness at trial. The trial counsel used crucial portions of Kennedy's testimony before Colonel Bush in his cross-examination of Captain Kennedy at the court-martial.

The relevant portions of Captain Kennedy's testimony before Colonel Bush are set out below:

> Testimony of Reid W. Kennedy, Captain, 068366, Assistant Staff Judge Advocate, Headquarters 7712 SCU, APO 227, U. S. Army, taken at Kaiserslautern, Germany, on 15 July 1953, by Colonel James E. Bush, IG, Assistant Inspector General, HQ. USAREUR. I have been directed, Captain Kennedy, to make an investigation into the matter of allegations made by Colonel Doctor against certain headquarters, and or commands, and also certain allegations made against Colonel Doctor by an individual in conducting an investigation of alleged irregularities in ECP Fund 959. You are to be interrogated under oath concerning your knowledge of

this subject, and this investigation is classified as confidential. You are not to discuss it with anyone as it is discussed here.

Witness was sworn.

379. Q. Please state your full name, grade, service number, organization, station, and principal duty. A. Reid W. Kennedy, Captain, 068366, Assistant Staff Judge Advocate, Headquarters 7712 SCU, APO 227, US Army.

* * *

383. Q. Are you familiar with Lt Col Doctor's recent case investigated and matters surrounding it? A. Yes, sir, I am.

384. Q. In what capacity have you been in the case? A. At the outset, I was appointed as defense counsel for Colonel Doctor.

385. Q. By whom? A. By the Staff Judge Advocate, then Major Prugh. I represented Colonel Doctor in the early . . . after the initial IG investigation and the early stages of the present case. I continued to act in this capacity up to about 9 July of this year.

386. Q. Until 9 July of this year? A. Approximately.

387. Q. Just last week, then? A. Yes, sir.

388. Q. So you have always represented him in this case? A. Technically that is correct. However, my function has been not by lawyer-client relationship. Colonel Doctor apparently just wanted someone to talk to. He would come up to talk to me, but I gave him no advice, nor did he ask any. He apparently made up his mind as to what course of action he intended to pursue throughout this entire Article 15 affair.

389. Q. In other words, am I to understand that there is no privileged matter or relationship relative to you and the Doctor in the sense of lawyer-client relationship? A. No, sir, that is not so. Colonel Doctor did confide in me and did tell me what he had intended to do. However, he did not ask, and normally, he did not normally ask any advice from me. On a few occasions he would ask for advice,

when it was given to him by me; in more cases than not, did not follow the advice I had given him. While the relationship existed, I was in a unique position with Colonel Doctor, in that he paid absolutely no attention to anything I said to him. I can best put it this way. When he came to me to tell me his problems by talking to me he seemed to clarify in his own mind what he was going to do, and he did it in almost every case.

• • •

405. Q. We will delay that until later. Did you advise Colonel Doctor on or about 7, 8 June that you would no longer be in a position to counsel him in this case? A. I advised him, as to the date, I cannot say, but I advised him that I could no longer act as advisor for him.

406. Q. But you did act as his advisor and counsel from the beginning until the 9th of July. Did you just tell me 9 July 1953? A. It is my recollection, just approximately a week ago that I advised Colonel Doctor that I could no longer advise him. I started at the very beginning of the Article 15 punishment to about a week ago. I talked to Colonel Doctor in everything he wanted to talk about.

407. Q. In other words, it is not the 7, 8 of June over a month ago, it was a week ago, not a month ago. A. I would say more than 15 days ago.

408. Q. Was this statement which you made to Colonel Doctor voluntary or at the direction of another person? In other words, why did you tell Colonel Doctor that? A. I was directed by the Staff Judge Advocate, Lt Col Charles A. Gross, that I should no longer act in an advisory capacity for Colonel Doctor.

409. Q. Did he tell you why? A. No, the reason was obvious to me, so I didn't pursue it.

410. Q. What was that obvious reason? A. As I have said before, Colonel Doctor didn't follow any advice I had given him. He made frequent trips to the Judge Advocate Office and—

411. Q. Western Area Command? A. Western Area Command, with the apparent thought in mind of discussing the case in all of its ramifications on each

visit. It was a complete waste of time, both my time and the time of the office, to go over each of those plans if Colonel Doctor was going to make no effort to follow the advice and information given him.

412. Q. It was alleged that the IG investigation conducted by Colonel Stout was biased and prejudiced. Have you any opinion from what knowledge you have of the case as to whether Colonel Stout was or was not biased and or prejudiced? Or do you feel that he was simply performing his duty as Inspector General of Western Area Command? A. I don't know what occurred at the inspector general investigation except what Colonel Doctor told me, but even based upon that, I could see nothing wrong with the way that Colonel Stout performed the IG investigation. It seemed to me it was correct in every legal detail.

* * *

Captain Kennedy, as defense counsel, denied to petitioner the effective assistance of loyal and honest defense counsel at his court-martial, to which he was entitled as of right under both military law and under the *U. S. Constitution,* amend. VI.

Petitioner was totally unaware of the nature of Kennedy's testimony before Colonel Bush until November, 1959, when civilian counsel finally secured a copy of the same.

Col. Doctor's free choice of counsel and his selection of witnesses was seriously hampered and impaired by the concealment and suppression of this vital piece of testimony, a concealment and suppression shared by Headquarters, Western Area Command, Headquarters, USAREUR, the trial counsel and by defense counsel. This concealment of vital evidence was shared by the Department of Army during the period of time that petitioner's court-marital was on appeal before an Army Board of Review and before the U. S. Court of Military Appeals. Petitioner did not have the free choice of counsel that was his right under both military law and under the *Sixth Amendment* to the *United States Constitution.*

Trial counsel, during the out-of-court hearing, at Col. Doctor's court-martial, numbered Appellate Exhibit 17, carefully questioned the plaintiff at length as to whether he desired Captain Kennedy to continue as defense counsel and as to whether he wished Captain Kennedy to testify as a defense witness. Col. Doctor vigorously answered in the affirmative as to both inquiries. However, trial counsel not only knew what was contained in Captain Kennedy's testimony before Colonel Bush, he used selected portions of it in his cross-examination of Captain Kennedy to the detriment of the accused. Trial counsel, knowing the disloyal nature of Kennedy's testimony, deliberately concealed such testimony from the plaintiff during such out-of-court hearing on this very vital question.

Col. Doctor's consent cannot be considered as an intelligent waiver of his rights freely to select defense counsel and to determine whether such counsel should testify as to privileged communications received from his client, Col. Doctor. Trial counsel failed in his duty to the then accused under the *Sixth Amendment, US Constitution,* to see that justice was done by not revealing to the petitioner the nature of Captain Kennedy's testimony before Colonel Bush at the time of the out-of-court hearing or prior to petitioner's trial.

The correspondence in the instant case dealing with the request by the accused for the complete Bush investigation is quite voluminous, as Ira Doctor tried again and again to gain the documentary information that should have been furnished to him from the first.

The first request to Army authorities for the Bush investigation was made by the petitioner's then defense counsel, Captain Reid W. Kennedy. He requested these documents prior to the appearance by the petitioner before the Investigating Officer, appointed pursuant to Article 32b, *Uniform Code of Military Justice.* Captain Kennedy

requested a copy of the full investigation. The Commanding General, Headquarters, Western Area Command, stated that the report of investigation was "privileged" pursuant to paragraph 151 b (3), *Manual for Courts-Martial,* 1951. The Commanding General furnished to the defense only a small portion of the testimony taken at such investigation. Captain Kennedy renewed his request for such testimony, but, faced with the language of the Commanding General, Headquarters, Western Area Command, he limited his request to the testimony of only certain witnesses. The Commanding General, Headquarters, Western Area Command, replied that no portion of the Bush investigation has been made available to the prosecutor where it is not available to the defense.

Neither petitioner nor his counsel were furnished with the balance of the Bush investigation for use at the trial. Specifically, Ira Doctor was not furnished with a copy of Captain Kennedy's testimony before Colonel Bush.

Lt. Colonel Jaffee, the trial counsel at petitioner's court-martial, had the entire Bush investigation in his possession at Col. Doctor's court-martial. The trial counsel did not offer the Bush investigation into evidence. He did not offer to make the entire report of investigation available to the defense. After having marked the Bush investigation for identification, Jaffee immediately returned it to a locked safe to keep it from defense counsel and from the accused. Trial counsel used the Bush investigation as a sword against Col. Doctor. The petitioner herein lacked the opportunity to employ it as a shield in his defense.

During the period of time that the case was pending before the Board of Review and the U. S. Court of Military Appeals on appeal, individual counsel for Col. Doctor sought to secure the missing portions of the Bush investigation. He was only able to secure copies of the testimony of the petitioner herein before Colonel Bush.

It was only in November, 1959 and after a year of persistent correspondence that it was possible for petitioner's counsel to examine and secure the full testimony contained in the Bush investigation. Colonel Doctor has been continuously denied access to the findings and recommendations of Colonel Bush.

When petitioner's present counsel sought the elusive report of the Bush investigation, he was met with the same alleged claim of "privilege" from the Office of the Inspector General, Department of Army, as had prior counsel. There was one difference. *Jencks* v. *United States,* 353 U. S. 657 and *United States* v. *Heinel,* 9 USCMA 259, 26 CMR 39, had been decided in the interim between requests. As stated above, it took a year of extensive correspondence to secure the testimony part of the Bush investigation. Petitioner is still denied access to the findings and recommendations of Colonel Bush.

The petitioner, by a motion, entitled Motion to Reopen, filed on the 15th day of August, 1962, bearing docket number 6772, moved the United States Court of Military Appeals to reopen the proceedings in that court and to reconsider its order of June 8, 1956, wherein said court had affirmed the findings and the sentence of the court-martial that had tried Col. Doctor, upon the grounds that fraud was perpetrated upon the court-martial which tried him and upon the further grounds of misrepresentation, misconduct of both trial counsel and defense counsel and the withholding and suppression of evidence favorable to the accused. The motion was in the nature of a writ of error, *coram nobis.* The statutory basis for the motion was contained in the "All-Writs Act," Title 28, *United States Code,* Sec. 1651. In connection with such motion to reopen, petitioner moved for discovery and inspection of the findings, recommendations, opinions and conclusions contained in the Report of Investigation of Col. Bush.

The United States Court of Military Appeals, by order dated October 25, 1962, arbitrarily and capriciously denied without opinion, petitioner's motions to reopen, and to direct discovery and inspection thereon.

Ira Doctor filed his petition with the Clerk of the United States Court of Claims on May 10, 1965, a date within six years of the date when his counsel finally received copies of Capt. Kennedy's testimony before Col. Bush, November, 1959. The petition was also filed within six years of the date of the order of the U. S. Court of Military Appeals arbitrarily refusing to grant petitioner's motion to reopen on the ground of fraud.

In the Court of Claims the government moved to dismiss the complaint. The government's motion was granted, the Court holding that the claim was barred by the statute of limitations, 28 U. S. C. Sec. 2501.

Reasons for Granting the Writ

The decision of the Court of Claims, holding the claim of Ira Doctor to be barred by limitations, conflicts with the holding of this Court in *Glus* v. *Brooklyn Eastern District Terminal,* 359 U.S. 231. The applicability of *Glus* v. *Brooklyn Eastern District Terminal, supra,* to claims presented to the U.S. Court of Claims has not as yet been decided by this Court.

In this final tribunal petitioner seeks the opportunity to offer documentary proof of the fraud perpetrated upon him and to clear his military record. He has twice been denied such opportunity, first by the U.S. Court of Military Appeals and lastly by the U.S. Court of Claims. Ira Doctor urges a violation of the attorney-client privilege guaranteed to him even by an Army court-martial pursuant to *U.S. Constitution,* amend. VI.

The absence of a holding by this Court applying the doctrine of *Glus* v. *Brooklyn Eastern District Terminal, supra,* to the U.S. Court of Claims has allowed a federal prosecutor (trial counsel herein) and the Army authorities to use the statute of limitations as a shield to conceal and suppress evidence that in fairness should have been made known to Ira Doctor, as an accused at his court-martial.

Glus v. *Brooklyn Eastern District Terminal, supra,* resolved a conflict between the decisions of several U.S. Courts of Appeals as to the nature of a federal statute of limitations, specifically that contained in the *Federal Employers' Liability Act.* In that case this Court destroyed the artificial distinction between a remedial statute of limitations and a substantive statute of limitations urged by cases such as *Damiano* v. *Pennsylvania R. Co.*, 161 F. 2d 534.

In *Glus* v. *Brooklyn Eastern District Terminal, supra,* this Court held that fraud or concealment by a defendant would estop him from relying on a statute of limitations to bar the plaintiff. This Court based its decision on the long standing equity maxim that " . . . no man may take advantage of his own wrong." There this Court allowed an equitable excuse for the delay in commencing suit, following *The Harrisburg,* 119 U.S. 199.

In *Holmberg* v. *Ambrecht,* 327 U.S. 392 (1946), this Court noted its earlier adoption of the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." "This equitable doctrine is read into every federal statute of limitations."

Petitioner pleads fraud and concealment. He did not discover the fraud until November 1959. The instant

claim was filed on May 10, 1965, well within the statutory six year period. The Court of Claims erred when it dismissed the claim of Ira Doctor based on the statute of limitations without affording him an opportunity to prove the fraud and concealment alleged.

This Court has not decided the applicability of *Glus* v. *Brooklyn Eastern District Terminal, supra,* and of *Holmberg* v. *Ambrecht, supra,* to claims arising in the U.S. Court of Claims. Petitioner seeks a review by this Court to demonstrate that the fraud and concealment practiced at his expense should extend his time to bring suit.

In *Soukaras* v. *United States,* 135 Ct. Cl. 88, 140 F. Supp. 797 (1956), cert. denied 352 U.S. 918, the Court of Claims refused to extend a claimant's time to bring suit where a fraud had been practiced on him. The Court of Claims reasoned that if the suit was founded on fraud, it would sound in tort, and that the Court of Claims lacked original jurisdiction of tort actions.

The claim of Ira Doctor is no more founded on fraud than was the cause of action alleged in *Glus* v. *Brooklyn Eastern District Terminal, supra.* Both actions are founded on statutes. In *Glus* v. *Brooklyn Eastern District Terminal, supra,* the fraud perpetrated by the defendant was held to extend the plaintiff's time to commence his action. The application of this equitable principal did not change plaintiff's cause of action from one founded on the statute to one sounding in tort. The same rule should apply to actions brought in the U.S. Court of Claims.

The several cases cited by the court below in its decision do not involve any fraud or concealment practiced by the government on the claimant.

The statute of limitations contained in the *Court of Claims Act,* 28 U.S.C. Sec. 2501, is not absolute and unbending. The Court of Claims has carved out a series

of exceptions to the limitations statute in military pay cases. These include the following:

1. The "continuing claim theory"—see *Friedman* v. *United States,* 159 Ct. Cl. 1, 310 F. 2d 381, cert. denied 373 U. S. 932. Periodic pay claims arising more than six years prior to suit are barred but not those arising within the six year span before suit even though the administrative refusal to pay the sum claimed may have occurred, or the statute on which the claim is grounded may have been enacted, prior to the six years. These were suits for additional pay at a higher grade than the claimant was receiving, under a statute or regulation.

2. Where the plaintiff had received positive "misadvice" from the military authorities. *Akol* v. *United States,* Ct. Cl, No. 564-57, decided April 17, 1964, 330 F. 2d 618.

3. Newly discovered evidence which caused the military, functioning as an administrative agency, to change its prior determination. *Egan* v. *United States,* 158 F. Supp. 377 (Ct. Cl., 1958). (No sound reason exists to carve out an exception where the administrative agency reverses its earlier denial of relief but to refuse to consider such exception where the refusal so to act on the part of the administrative agency is arbitrary and capricious.)

4. Where a discharge is voided by the military service. *Motto* v. *United States,* 348 F. 2d 523 (Ct. Cl., 1965). (No consideration is given to those instances where the discharge should have been voided.)

The Court of Claims also tolled the statute of limitations, 28 U.S.C. Sec. 2501, in those cases where the courts of the United States were effectively closed to the plaintiff for a period of time. *Oerlikon Machine T. Wks. Buehrle & Co.* v. *United States,* 102 F. Supp. 417 (Ct. Cl., 1952), rev'd at 138 Ct. Cl. 457, 151 F. Supp. 332, on the ground

that the statute of limitations, as tolled, expired before suit was brought.

The exception that petitioner seeks to have imposed upon 28 U.S.C. Sec. 2501 is for fraud and concealment. The fraud and concealment practiced on Ira Doctor involves the violation of his rights under *U. S. Constitution*, amend VI. The reasons underlying such exception are stronger than the reasons underlying certain of the exceptions to the statute of limitations already adopted by the Court of Claims. This exception is consistent with the doctrine enunciated by this Court in *Glus* v. *Brooklyn Eastern District Terminal, supra.*

Petitioner asks that certiorari be granted to consider an important statutory question with respect to military pay. *Bell* v. *United States*, 366 U. S. 393.

CONCLUSION

For the foregoing reasons, this petition for certiorari to the United States Court of Claims should be granted.

Respectfully submitted,

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Appendix A

IN THE

UNITED STATES COURT OF CLAIMS

No. 150-65

IRA P. DOCTOR

v.

THE UNITED STATES

ORDER

This case comes before the court on defendant's motion to dismiss the petition. Upon consideration thereof, together with the opposition thereto, and without oral argument, it is concluded on the basis of *Merriott* v. *United States,* 163 Ct. Cl. 261, *cert. denied* 379 U. S. 838 (1963); *Goldstein* v. *United States,* 131 Ct. Cl. 228, 130 F. Supp. 330, *cert. denied,* 350 U. S. 888 (1955); *Friedman* v. *United States,* 159 Ct. Cl. 1, 310 F. 2d 381, *cert. denied,* 373 U. S. 932 (1962); and *Dayley* v. *United States,* 169 Ct. Cl. 305 (1965), that plaintiff's alleged claim is barred by the statute of limitations, 28 U. S. C. § 2501, and

IT IS ORDERED that defendant's motion to dismiss the petition be and the same is granted and plaintiff's petition is dismissed.

BY THE COURT
WILSON COWEN
Chief Judge

Appendix B

U. S. CONSTITUTION, amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . to be confronted with the witnesses against him; . . .. and to have the Assistance of Counsel for his defence.

Title 28 U. S. C. CHAPTER 165—COURT OF CLAIMS PROCEDURE

SEC. 2501. Time for filing suit

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.